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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1202

INTERNATIONAL-STANLEY CORPORATION,
A NEBRASKA CORPORATION,
Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN AS DIRECTOR OF REVENUE OF THE STATE OF ILLINOIS, AND ALAN J. DIXON AS TREASURER OF THE STATE OF ILLINOIS.
Appellees.

ON APPEAL FROM THE APPELLATE COURT
OF ILLINOIS, FIRST DISTRICT

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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I.

Although Appellees Misdirected the Appellate Court of Illinois on the Point, Neither Tax Evasion Nor Tax Avoidance Has at Any Time Been an Issue in This Case

Appellees' Statement Of The Case asserts that the Appellate Court upheld the Illinois tax "despite plaintiff's corporate structure." Appellees then commence their Argument with references to tax avoidance and implications that somehow Appellant is attempting to escape a just tax by technicalities.

At no time in the long history of this litigation has there ever been an issue concerning tax evasion or avoidance, technicalities of acceptance of orders or locus of sales, or the abstract jurisdiction of Illinois to tax Appellant. Nothing in the Trial Court's opinion for Appellant referred to or even suggested the existence of any such issues.

Those non-issues were first introduced into this case by Appellees' Brief filed with the Appellate Court [Brief For Defendants-Appellants, Cross-Appellees, p. 13]:

> "So, not only does plaintiff engage in substantial business activities within the state, it also has substantial local business connections and the extent of these relationships clearly indicates that the corporate fiction should not be sufficient to relieve plaintiff of the obligation to pay duly imposed local taxes on the revenues it has derived from local operations. Plaintiff should not be permitted to channel retail sales of products manufactured in Illinois by the parent corporations through a foreign subsidiary in order to avoid payment of the Illinois retailers' occupation tax."

Because neither nexus nor jurisdiction to tax was ever an issue in this case, the only apparent purpose of such language was to route the Appellate Court down the paths of irrelevance.

The attempt succeeded. During oral argument in the Appellate Court, Counsel for Appellant [Appellee in that Court] attempted to rebut the State's reiterated inference of tax evasion or avoidance by announcing that the identity of the taxpayer was not relevant and that the result in the case should be identical with what it would be if International Paper Company or The Stanley Works were the taxpayers, *to wit*, the tax would still unconstitutionally burden interstate commerce.

Notwithstanding Appellant's attempt to keep the case on course, the Appellate Court wrote [Jurisdictional Statement, p. A8 at A16]:

> "* * * If the actual corporate owners of Plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable."

Appellant respectfully suggests that the Appellate Court's failure deliberately to consider the many opinions of this Court holding taxes like those assessed here to be violative of the Commerce Clause [Jurisdictional Statement, pp. 12-18] was due, in large part, to the "tax avoidance" coloration which Appellees unfairly injected into the proceedings before the Appellate Court.

II.

Appellees' Assertion That the Appellate Court Did Not Base Its Decision Upholding the Tax Upon The Fact That Grain Doors Were "Delivered" in Illinois Is Incorrect

Appellees commence their argument with an assertion that the Appellate Court did not reverse the trial court and uphold the tax on the theory that the grain doors were "delivered" in Illinois. The logic of Appellees' argument is not readily comprehensible but it is clear that Appellees are dead wrong in their assertion.

The Appellate Court divided Appellant's sales of grain doors into the following four categories [Jurisdictional Statement, p. A8 at A11]:

> "1) The customer railroad takes delivery of the grain doors outside of Illinois and functional use of the doors commences outside of Illinois.
>
> 2) The railroad takes delivery of the grain doors in Illinois where functional use begins.
>
> 3) The railroad takes delivery of the grain doors in Illinois but transports them out of the State where functional use begins.
>
> 4) The railroad takes delivery of the doors outside of Illinois but brings them into Illinois where functional use begins."

The Appellate Court held that gross receipts from sales of grain doors in categories 1) and 4) were not taxable but that gross receipts from sales of grain doors in categories 2) and 3) were. Categories 1) and 3) were each concerned with grain doors which were functionally used in interstate commerce outside of Illinois. The tax results varied because of the place of "delivery," either within Illinois (taxable) or outside-of-Illinois (non-taxable).

III.

The Appellate Court's Conclusion That "Delivery" Took Place Within Illinois Is Based Upon an Illinois Rule Which Is Not Relevant to a Correct Decision of the Commerce Clause Question

The trial court held that imposition of the Illinois Retailers Occupation Tax would unconstitutionally burden interstate commerce to the extent it taxed Appellant's gross receipts from sales of grain doors destined for outside-of-Illinois locations. After reviewing the legislative history of a specific "rolling stock moving in interstate commerce" exemption (which had always been in the Illinois Use Tax Act but did not become part of the Illinois Retailers' Occupation Tax Act ["ROTA"] until 1967 [Jurisdictional Statement, p. 11]), the trial court based its decision on the ROTA's generic "interstate commerce" exemption from tax liability [Jurisdictional Statement, p. A1 at A4-A5].

The trial court did not ground its decision to any extent upon a finding that "delivery" of the grain doors did or did not take place within Illinois; indeed there is nothing in the record to support the Appellate Court's finding of "delivery" [Jurisdictional Statement, p. A23 at A27-A28, paragraph 4.3]. The Appellate Court overruled the trial court's holding that the Commerce Clause precluded imposition of the tax with but little discussion [Jurisdictional Statement, p. A8 at A19]:

> "The fact that the grain doors are sold and delivered to railroads in Illinois for use out of the State does not necessarily make the sales transaction interstate so as to render application of ROTA unconstitutional. (*Moffat Coal Co.*, 405 Ill. 14, 16, 89 N.E.2d 892.) Furthermore, the Supreme Court has rejected the argument that the role of a railroad as a carrier when it carries goods consigned to itself is separate and divorced from its role as a purchaser of such goods (*Pressed Steel Car Co.*, 7 Ill.2d 95, 101, 129 N.E.2d 765.) We conclude that imposition of the tax by defendant on sales in category 3 is within constitutional requirements."

The *Pressed Steel Car* case concerned railroad ties which had been sold by Illinois retailers to be used by their railroad customers in their own businesses. The railroads argued that there had been no delivery to them within Illinois because they had received the ties "as carriers" rather than "as purchasers," an argument never made in this case. There was no reason whatever—and no practical assurance—that the railroads after receiving the ties within Illinois would not have used them to repair Illinois roadbeds. The Illinois Supreme Court rejected the Commerce Clause argument [7 Ill. 2d 95 at 98-99]:

> "The argument against the tax is based upon the commerce clause of the Federal constitution, and stresses the intention of the seller and the purchaser that the goods sold should be shipped to a destination outside of Illinois, and the fact that the goods were actually so shipped. It appears to be settled, however, that a transaction by which a purchaser buys goods which are delivered to him within the taxing State may properly measure a tax, even though both parties know that the goods are purchased for use outside of the State, and they are so used. *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390; * * *."

In this Court's *Superior Oil Company* case, gasoline had been sold by a Mississippi oil company to Mississippi shrimp packers and delivered to them within Mississippi at which time the purchasing packers could do as they liked with the gasoline. The packers then carried the gasoline to Louisiana. In what was a transparent attempt to avoid Mississippi taxes by elevating

form over substance, the packing company would turn over to the selling oil company a so-called "bill of lading" which purported to show that the gasoline was to be transported by the packing company to a point outside of Mississippi. A Louisiana "neighborhood" rather than any specific point was named as destination for alleged redelivery of the gasoline there into the tanks of fishing boats. Mr. Justice Holmes, writing for the Court, recognized the decisive fact as being the clear attempt of the purchaser to convert an intrastate purchase into an interstate transaction [280 U. S. 390 at 394-395, 396]:

> "* * * The document seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. The document hardly can affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause' * * * at least when the contract achieves nothing else.
>
> "* * * We may admit that this case is near the line.
>
> "* * * But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself the purchase would not have been interstate commerce because the fishing grounds were known by both parties to be beyond the State line. A distinction has been taken between sales made with a view to a certain result and those made simply with indifferent knowledge that the buyer contemplates that result. * * * The only purpose of the vendor here was to escape taxation. * * * It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by

> the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

There is at least one essential difference between this case and *Superior Oil*. There a taxpayer attempted to avoid legitimate state taxes by elevating form over substance, by making transactions appear to be different from what they really were. Here the question is whether just the contrary is true: do the tax collectors rather than the taxpayer seek to elevate form—in this case "delivery"—over substance in order to justify a tax on interstate commerce?

IV.

Appellees Improperly Seek to Justify the Illinois Retailers' Occupation Tax Act's Lack of Apportionment by Treating It "As If" It Imposed a Sales Tax Rather Than an Occupational Tax

The activity taxed by Illinois' ROTA is the "business of selling tangible personal property at retail" [Jurisdictional Statement, p. A43]. The Appellate Court conceded that most of Appellant's activities essential to the conduct of its retail occupation—"including maintenance of a business headquarters, billing, collection, and the keeping of records" [Jurisdictional Statement, p. A8 at A17]—were carried out in locations outside of Illinois.

If we were concerned with a sales tax rather than an occupational tax, there would be validity to Appellees' theory of apportionment; in such a case the activities taxed—sales within Illinois—would be apportioned exactly to what took place within Illinois, the making of sales in Illinois.

Appellees repeat several times in their Motion To Dismiss Or Affirm their confusion between a sales tax and an occupational tax [Motion To Dismiss Or Affirm pp. 6, 7]:

> "* * * A tax on local sales has never been held to be such an 'integral' part of commerce [as to constitute an impermissible burden on interstate commerce]. * * * [S]ince the purchasing railroads took delivery of the goods (grain doors) inside the State, the sale was not made in interstate commerce. * * * Since the sales in question in the instant case were not made in interstate commerce, they were properly taxable by the State of Illinois * * *."

It is a fundamental principle of constitutional law that this Court will not review a state tax case "as if" the state had enacted a different taxing statute from the one under which it in fact assessed a tax in the particular case to be decided. *Evco* v. *Jones*, 409 U. S. 91, 93, 94; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 330, 331.

WHEREFORE, Appellant respectfully requests that probable jurisdiction be noted for the reasons set forth in its Jurisdictional Statement.

Respectfully submitted,

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